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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Joey Frank Montoya,
9 Plaintiff
10 -vs-
Unknown Saeg, et al.,
Defendants.

CV-13-1491-PHX-ROS (JFM)

Report and Recommendation

11 **Background** - In its Order filed February 20, 2014 (Doc. 13), the Court ordered
12 Plaintiff to file a memorandum showing cause why this case should not be dismissed
13 without prejudice for failure to effect service.

14 On March 11, 2014, Plaintiff wrote a letter, which the Clerk of the Court has
15 docketed as a Motion for Status (Doc. 15). That motion was stricken as being an
16 improper communication with the Court. (Order 3/14/14, Doc. 16.) Plaintiff was given
17 an additional 14 days to file a response to the Order to Show Cause. Plaintiff has not
18 responded.

19 **Application of Law to Facts** - Federal Rule of Civil Procedure 4(m) provides:

20 If a defendant is not served within 120 days after the complaint is
21 filed, the court--on motion or on its own after notice to the plaintiff--
22 must dismiss the action without prejudice against that defendant or
23 order that service be made within a specified time. But if the
plaintiff shows good cause for the failure, the court must extend the
time for service for an appropriate period.

24 Local Civil Rule 16.2(b)(2)(B), which governs prisoner civil rights suits, provides
25 that service shall be completed by the "maximum date to effect service, pursuant to Rule
26 4 of the Federal Rules of Civil Procedure, or sixty (60) days from filing of service order,
27 whichever is later."

28 Plaintiff's First Amended Complaint (Doc. 7) was filed on October 4, 2013. The

1 Court's service Order (Doc. 8) was entered on December 10, 2013. A review of the
 2 Court's file reflects that service on the sole remaining defendant, Defendant Saeg, was
 3 returned unserved on January 28, 2014. (Doc. 11.) Under the foregoing rules, service in
 4 this matter should have been completed by February 10, 2014.

5 Dismissal of a party is appropriate where a plaintiff fails to show good cause for
 6 delays in service. *See Walker v. Sumner*, 14 F.3d 1415 (9th Cir. 1994) (upholding
 7 dismissal where no showing of good cause for delay in service).

8 At a minimum, "good cause" means excusable neglect. A plaintiff
 9 may also be required to show the following: (a) the party to be
 10 served personally received actual notice of the lawsuit; (b) the
 defendant would suffer no prejudice; and (c) plaintiff would be
 severely prejudiced if his complaint were dismissed.

11 *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir.1991).

12 Notwithstanding Rule 4(m), where "good cause does not exist, the court may in
 13 its discretion decide whether to dismiss the case without prejudice or extend time for
 14 service." *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1305 (3rd Cir. 1995). "[I]f
 15 good cause is not established, the district court may extend time for service upon a
 16 showing of excusable neglect." *Lemoge v. U.S.*, 587 F.3d 1188, 1198 (9th Cir. 2009).

17 Plaintiff has not responded to the Court's Order to show Cause and has failed to
 18 show good cause or excusable neglect to justify an extension of time to complete service
 19 on Defendant Saeg.

20 **IT IS THEREFORE RECOMMENDED** that, pursuant to Rule 4(m), this case
 21 be **DISMISSED WITHOUT PREJUDICE**.

22 **EFFECT OF RECOMMENDATION**

23 This recommendation is not an order that is immediately appealable to the Ninth
 24 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules*
 25 *of Appellate Procedure*, should not be filed until entry of the district court's judgment.

26 However, pursuant to *Rule 72, Federal Rules of Civil Procedure*, the parties shall
 27 have fourteen (14) days from the date of service of a copy of this recommendation within
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1 which to file specific written objections with the Court. Thereafter, the parties have
2 fourteen (14) days within which to file a response to the objections. Failure to timely file
3 objections to any findings or recommendations of the Magistrate Judge will be
4 considered a waiver of a party's right to *de novo* consideration of the issues, *see United*
5 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute
6 a waiver of a party's right to appellate review of the findings of fact in an order or
7 judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v.*
8 *Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

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10 Dated: April 8, 2014

11 13-1491o Order 14 04 07 re RR Dismiss FTSrv.docx

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James F. Metcalf
United States Magistrate Judge